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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDLIO GASTELUM, Defendant.	Case No. 08CR2032-JLS **UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS:** **(1) TO COMPEL DISCOVERY;** **(2) TO PRESERVE EVIDENCE;** **(3) TO SUPPRESS EVIDENCE UNDER THE FOURTH AMENDMENT;** **(4) TO SUPPRESS STATEMENTS UNDER THE FIFTH AMENDMENT;** **(5) TO SEVER COUNTS;** **(6) TO DISMISS THE INDICTMENT DUE TO MISINSTRUCTION;** **(7) TO PRODUCE GRAND JURY INSTRUCTIONS;** **(8) FOR LEAVE TO FILE FURTHER MOTIONS.** **UNITED STATES' MOTION FOR:** **(1) RECIPROCAL DISCOVERY** Date: August 21, 2008 Time: 9:00 a.m. Honorable: Janis L. Sammartino

Plaintiff, United States of America, by and through its counsel, Karen P. Hewitt, United States Attorney, and Charlotte E. Kaiser, Assistant United States Attorney, hereby files its Response and Opposition to Defendant's Motions to Compel Discovery, to Preserve Evidence, to Suppress Evidence under the Fourth Amendment, to Suppress Statements under the Fifth Amendment, to Sever Counts, to Dismiss the Indictment due to Misinstruction, to Produce Grand Jury Instructions, and for Leave to File Further Motions and the United States' Motion for Reciprocal Discovery. This Response and Opposition and Motion are based upon the files and records of the case together with the following statement of facts and memorandum of points and authorities.

I

STATEMENT OF FACTS

On June 5, 2006 at approximately 7:25 a.m., United States Border Patrol apprehended Defendant Jose Baudlio Gastelum for alien smuggling. Border Patrol Agents conducting field operations responded to a dispatch call that there were six suspected illegal aliens in an area known as the Ponds near the Calexico East Port of Entry. The Ponds is in close proximity to the Mexico/United States boundary line and is adjacent to the southbound vehicle lanes of the Calexico East Port of Entry. This area is known to Border Patrol Agents as an area where illegal aliens further their entry into the United States and hide in the brush to conceal themselves from detection as they travel northbound. According to the call, the six individuals loaded up into a white four door car bearing Baja California tags and the vehicle was seen last traveling northbound on Highway 7. Supervisory Border Patrol Agent Jay Catalioto was located near the intersection of Highway 7 and Highway 98. He observed a white four door Honda Accord bearing Baja California license plates traveling away from the Port of Entry and northbound on Highway 7. As the vehicle made its way past the intersection, he observed several occupants in the vehicle and a young male with short hair wearing a light colored button up shirt driving the vehicle. He maintained visual of the vehicle as other Agents responded. Once the vehicle reached Interstate 8, it proceeded to travel westbound. Thereafter, Catalioto followed the vehicle. According to at least one Material Witness located in the vehicle, Defendant realized that Border Patrol was following him and said they were "screwed." To avoid endangering the general public and themselves with a vehicle pursuit, Border Patrol Agents then employed a Controlled Tire Deflation Device (CTDD). The vehicle's tires were deflated but Defendant continued to travel westbound, made several turns and then exited off of Interstate 8 via the Bowker Road exit. Shortly thereafter, he abruptly stopped the vehicle along the east of the roadway that is along a cement lined irrigation canal. Defendant then exited the vehicle via the driver's side door and fled on foot. After a chase that involved Defendant jumping into the canal, Catalioto was able to apprehend him. While Catalioto was engaged in the foot pursuit, Border Patrol Agent Heriberto Acevedo approached the vehicle and identified himself as a Border Patrol Agent to the six remaining occupants. Acevedo questioned each occupant as to their citizenship and their right to be in or remain in the United States. All six admitted to being citizens and nationals of Mexico illegally present in the United States. Border Patrol Agents arrested Defendant and the illegal aliens and took them to Calexico Border Patrol Station for further processing.

At the station, Field Operations Supervisor Nelson Atiles advised Defendant of his Miranda Rights in the English language and Border Patrol Agent Charlie Toledo witnessed those rights. The advisement of rights is captured on videotape. After the advisement of rights, Defendant stated in essence that he wanted his attorney and then said that "you have to understand why I did it." Atiles asked Defendant if he wanted his attorney and Defendant confirmed that he did so. Atiles then stated that Defendant invoked his right to counsel and noted the time as being 8:25 a.m. Defendant then stated in essence, "everything I did I had no choice." As the apprehension report states:

> The video sworn statement was stopped at this time and no further questions were asked. The GASTELUM began to speak freely of the matter of why he was arrested by the Border Patrol and stated that he was driving the car. At this time, FOS Atiles asked GASTELUM if he was willing to speak freely and voluntarily under oath. GASTELUM agreed to speak and FOS Atiles began the video sworn statement again at 8:26 a.m.

Back on the videotape, Atiles asked Defendant whether he was speaking "freely" on the record to which Defendant confirmed. Atiles then asked Defendant, "are you sure you want your attorney present?" and Defendant responded in essence he did not want one. Atiles confirmed with Defendant that he is speaking "freely and willingly." Defendant then provided a sworn statement under oath in which he essentially admitted that he smuggled illegal aliens. Generally, Defendant stated that he was supposed to be sentenced on June 6, 2008 for drug smuggling. He described how the purported drug smuggler involved in that offense contacted him and threatened to harm his wife and child if he did not smuggle the aliens.

Agents also advised Defendant of his Lujan Castro rights as to whether he wanted to retain any of the illegal aliens on his behalf. Defendant identified Jorge Ortiz-Gonzalez to remain in custody until

Defendant's lawyer could speak with him. Defendant also signed a statement acknowledging that the other aliens may be released without being interviewed by him or his attorney. Agents also determined to retain three of the illegal aliens as Material Witnesses: Ernesto Martinez-Mosqueda, Blanca Morado-Lopez, and Jose Alberto Toledo-Corrales. Regarding the remaining two illegal aliens, these aliens were released back to Mexico.

II

UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS

A. AN ORDER COMPELLING DISCOVERY IS UNNECESSARY

The United States has produced 248 pages and 4 compact discs of discovery as of the filing of this response. The United States has complied and will continue to comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jenks Act, 18 U.S.C. § 3500, and Federal Rule of Criminal Procedure ("Rule") 16. Based on this compliance, an order to compel discovery is unwarranted and the request for such an order should be denied.

1. Brady Material

The United States has complied and will continue to comply with its obligations to disclose exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963). Under Brady and United States v. Agurs, 427 U.S. 97 (1976), the government need not disclose "every bit of information that might affect the jury's decision." United States v. Gardner, 611 F.2d 770, 774-75 (9th Cir. 1980). The standard for disclosure is materiality. Id. "Evidence is material under Brady only if there is a reasonable probability that the result of the proceeding would have been different had it been disclosed to the defense." United States v. Antonakeas, 255 F.3d 714, 725 (9th Cir. 2001). Impeachment evidence may constitute Brady material "when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence." United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004) (internal quotations omitted). The United States has provided such evidence to Defendant and will continue to comply with its discovery obligations.

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2. Any Proposed 404(b) and 609 Evidence

______The United States will disclose in advance of trial the general nature of any "other bad acts" evidence that it intends to introduce at trial pursuant to Federal Rule of Evidence 404(b), as well as any prior convictions it intends to use as impeachment pursuant to Rule 609.

3. Preservation of Evidence

The United States will preserve all evidence to which Defendant is entitled to pursuant to the relevant discovery rules of which is within the United States' possession, custody or control. The United States objects to a blanket request to preserve all physical evidence.

4. Defendant's Statements

The United States has provided Defendant with reports as well as written or recorded statements made by Defendant that is within the United States' possession, custody, or control.

5. Tangible Objects

The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy tangible objects that are within its possession, custody, or control, and that is either material to the preparation of Defendant's defense, or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant.

6. Expert Witnesses

The United States will comply with Rule 16(a)(1)(G) and provide Defendant with notice and a written summary of any expert testimony that the United States intends to use during its case-in-chief at trial under Rules 702, 703, or 705 of the Federal Rules of Evidence. The United States will do so no later than the filing of its trial memorandum.

7. Witness Addresses

The United States will provide the names of the witnesses it intends to call at trial. Defendant already has received access to the names of potential witnesses to the crimes through the discovery. The United States objects to Defendant's request for witness addresses. Defendant cites no cases nor any rules of discovery that required the United States to disclose witness addresses. Regarding any Border Patrol Agents, Defendant may contact them through the Calexico Border Patrol station.

8. Jencks Act Material

The United States has and will comply with the disclosure requirements of the Jencks Act. For purposes of the Jencks Act, a "statement" is (1) a written statement made by the witness and signed or otherwise adopted or approved by him, (2) a substantially verbatim, contemporaneously recorded transcription of the witness's oral statement, or (3) a statement by the witness before a grand jury. 18 U.S.C. § 3500(e). Notes of an interview only constitute statements discoverable under the Jencks Act if the statements are adopted by the witness, as when the notes are read back to a witness to see whether or not the government agent correctly understood what the witness was saying. United States v. Boshell, 952 F.2d 1101, 1105 (9th Cir. 1991) (citing Goldberg v. United States, 425 U.S. 94, 98 (1976)). By the same token, rough notes by an agent "are not producible under the Jencks Act due to the incomplete nature of the notes." United States v. Cedano-Arellano, 332 F.3d 568, 571 (9th Cir. 2004).

9. Informants and Cooperating Witnesses

At this time, the United States is not aware of any confidential informants or cooperating witnesses involved in this case. The government must generally disclose the identity of informants where (1) the informant is a material witness, or (2) the informant's testimony is crucial to the defense. Roviaro v. United States, 353 U.S. 53, 59 (1957). These threshold requirements have been interpreted to require that, if any cooperating witnesses or informants were involved or become involved, Defendant must show that disclosure of the informer's identity would be "relevant and helpful" or that the informer was the sole percipient witness before he would even be entitled to an in-camera evidentiary hearing regarding disclosure of the informer's identity. United States v. Jaramillo-Suarez, 950 F.2d 1378, 1386-87 (9th Cir. 1991), quoting Roviaro, 353 U.S. at 60. Any bias issues will be handled pursuant to Brady.

10. Specific Discovery Requests

a. Request for TECS

The United States objects to providing Defendant with crossing reports from the Treasury Enforcement Communications System ("TECS"). TECS reports are not subject to Rule 16(c) because the reports are neither material to the preparation of the defense, nor intended for use by the Government as evidence during its case-in-chief. The TECS reports are not Brady material because the TECS reports do not present any material exculpatory information or any evidence favorable to Defendant that is material to guilt or punishment. If the United States intends to introduce TECS information at trial, discovery of the relevant TECS reports will be made by the time of the filing of its trial memorandum.

b. Request to View the Vehicle

The United States does not object to Defendant's request to inspect the vehicle in which Defendant was driving on June 5, 2008.

c. Identities and Contact Information of the Individuals in the Vehicle

Defendant requests the identifies and contact information of the released aliens. Defendant already received the identities of the released aliens in the apprehension report and thus this issue is moot. Moreover, for the same reasons why the United States objects to the providing witness addresses, it objects to the request for contact information.

d. Reports Concerning Those Aliens Returned to Mexico

The United States has disclosed these reports and thus this issue is moot.

e. Information Concerning July Interview of Blanca Morado-Lopez

The United States disclosed the recent interview report of Material Witness Blanca Morado-Lopez and thus the issue is moot.

f. Giglio/Henthorn Material

The United States will comply with United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and will request that all federal agencies involved in the criminal investigation and prosecution review the personnel files of the federal law enforcement inspectors, officers, and special agents whom the United States intends to call at trial and disclose information favorable to the defense that meets the appropriate standard of materiality. United States v. Booth, 309 F.3d 566, 574 (9th Cir. 2002)(citing United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992)). If the materiality of incriminating information in the personnel files is in doubt, the information will be submitted to the Court for an in camera inspection and review.

Henthorn expressly provides that it is the "government," not the prosecutor, which must review the personnel files. Henthorn, 931 F.2d at 30- 31. Accordingly, the United States will utilize its typical practice for review of these files, which involves requesting designated representatives of the relevant agencies to conduct the reviews. As such, the United States opposes any request for an order that the prosecutor personally review the personnel files.

The United States will comply with the requirements of Giglio v. United States, 405 U.S. 150 (1972). At this time, the United States is unaware of any promises in exchange of testimony by its prospective witnesses.

11. Residual Request

As stated above, the United States has compiled with its discovery obligations. To the extent the United States receives new evidence, it will continue to comply with its discovery obligations in a timely manner.

B. A MOTION TO PRESERVE EVIDENCE IS UNNECESSARY

1. The Vehicle Driven By Defendant

At the case's inception, the United States advised Defendant that the vehicle was seized and thus preserved as part of the on-going prosecution. Thus, this request is moot.

2. Law Enforcement Communications Related to Defendant's Apprehension

The United States already provided a compact disc of the radio communications between the Border Patrol Agents regarding their pursuit of Defendant during the commission of the offense. In his motion, however, Defendant makes the cryptic allegation that Agents communicated electronically by other means than those memorialized in the compact disc based on a review of the disc. Defendant points to no specific facts to support this allegation. Because the United States already provided Defendant with the recorded communications regarding Defendant's apprehension, this request should be denied.

C. THE MOTION TO SUPPRESS EVIDENCE UNDER THE FOURTH AMENDMENT SHOULD BE DENIED WITHOUT A HEARING

According to Defendant, the agents did not have reasonable suspicion to conduct the vehicle stop, the means used to effectuate the stop (use of a CTDD) required probable cause and, in any case, use of a CTDD is an excessive use of force. For the reasons set forth below, Defendant's arguments lack factual and legal support. As such, an evidentiary hearing is unnecessary.

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1. Reasonable Suspicion Existed In This Case

In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the Supreme Court listed a number of non-exclusive factors, the totality of which gave rise to reasonable suspicion. Most of those factors are identical to the ones present in the case at bar: (1) characteristics of the area; (2) proximity to the border; (3) usual patterns of traffic and time of day; (4) previous alien or drug smuggling in the area; (5) behavior of the driver including obvious attempts to evade officers; (6) model and appearance of the vehicle; and (7) officer experience. Id. at 884-85; United States v. Sigmond-Ballesteros, 309 F.3d 545, 547 (9th Cir. 2002); United States v. Tiong, 224 F.3d 1136, 1139 (9th Cir. 2000). Under the totality of the circumstances approach, a Court should not evaluate reasonable suspicion factors "in isolation from each other . . . although each of the series of acts [may be] 'perhaps innocent in itself' . . . taken together, they [may] 'warrant further investigation.'" United States v. Arvizu, 534 U.S. 266, 274 (2002) (quoting Terry v. Ohio, 392 U.S. 1, 22 (1968)).

The Border Patrol Agents had reasonable suspicion. The Ponds area is next to the Calexico East Port of Entry and is very close to the border. That area is known by Border Patrol Agents as being used frequently by aliens to further their entry into the United States illegally. On June 5, 2008, Border Patrol Agents received a call of six suspected illegal aliens loading up into a white four door car bearing Baja California tags in that area. The call also indicated that the vehicle was seen last traveling northbound on Highway 7. Shortly thereafter, a Border Patrol Agent near the intersection of Highway 7 and Highway 98 observed a vehicle fitting that description traveling northbound on Highway 7 and away from the Port of Entry. He also observed several occupants in the vehicle as well as Defendant. These facts, combined with the agents' collective experience with the Ponds area, establishes reasonable suspicion to believe that the vehicle was being used to smuggle illegal aliens into the United States. As the Court explained in Tiong, even if Defendant could come up with "a possible innocent explanation for every police observation," that would not undermine reasonable suspicion in this case. 224 F.3d at 1140; see also United States v. Crapser, 472 F.3d 1141, 1147-48 (9th Cir. 2007).

Although the aforementioned facts establish reasonable suspicion, this case has even more facts that no only support reasonable suspicion but also probable case. Indeed, Defendant did not stop the vehicle after Border Patrol deployed the CTDD; instead he kept driving the vehicle and exited Interstate

8. Once the vehicle came to a stop, Defendant exited the driver's side door and fled on foot, even jumping into an irrigation canal to avoid law enforcement. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (a defendant's flight constitutes "the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."). Because Defendant had not yet been "seized" at the time he fled, his "evasive behavior is a pertinent factor in determining reasonable suspicion." Id.; see also United States v. Smith, 217 F.3d 746, 750 (9th Cir. 2000) (a suspect is not seized for purposes of the Fourth Amendment until "the suspect is physically subdued or submits to the assertion of authority;" "evasive actions contribute to the totality of circumstances suggesting reasonable suspicion"); United States v. Santamaria-Hernandez, 968 F.2d 980, 984 (9th Cir. 1992). Based on these facts, the Border Patrol Agents had reasonable suspicion in this case.

2. Use of the CTDD Did Not Transform the Stop Into An Arrest

Defendant argues that the Agents lacked probable cause to apprehend Defendant, asserting that they arrested Defendant when they deployed the CTDD. Agents, however, need only reasonable suspicion to deploy a CTDD. See United States v. Payan-Valenzuela, 06CR2158-JM, 2007 WL 2712278 (S.D. Cal. Sept. 14, 2007) (determining that only reasonable suspicion is required to conduct a vehicle stop with a CTDD). Officers making investigatory stops are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." United States v. Hensley, 469 U.S. 221, 235 (1985); see also Alexander v. County of Los Angeles, 64 F.3d 1315, 1320 (9th Cir. 1995) ("It is well settled that when an officer reasonably believes force is necessary to protect his own safety or the safety of the public, measures used to restrain such as stopping them at gunpoint and handcuffing them are reasonable."). Here, Agents had concrete and specific facts demonstrating the vehicle Defendant was driving contained illegal aliens. He was driving on Interstate 8 and thus, rather than endanger the public with a vehicle pursuit, Agents employed a CTDD.

Defendant's argument that the use of the CTDD is equivalent to an arrest is largely premised on two cases involving airport detentions. In Florida v. Royer, 460 U.S. 491 (1983), the Supreme Court held that the defendant was arrested when officers seized his ticket, identification and luggage and placed him in a "large closet" with two police officers accusing him of carrying narcotics. Id. at 502-03.

Similarly in United States v. Place, 462 U.S. 696 (1983), the Supreme Court found that although luggage may be seized for the purpose of a brief investigation based on reasonable suspicion, a seizure of luggage lasting 90 minutes requires probable cause. Id. at 706, 709-10.

The situation presented here differs from the cases cited by Defendant. First, contrary to Defendant's portrayal of the use of the CTDD as "violently [bringing] the car to a stop[,]" the CTDD is a safety device, designed to release the air from inflated tires in a gradual and regulated fashion. Use of the CTDD by Agents in this district reduces the number of alien and drug load vehicles that would otherwise attempt to flee from impending arrest, and use reckless or blatantly dangerous maneuvers to do so. To evade capture, the criminal drivers of such vehicles may behave irrationally, placing themselves, their passengers, and the general public at great risk. The CTDD safely disables a vehicle in a way that prevents the driver from resorting to extreme measures while traveling on major Interstates such as Interstate 8. Accordingly, the use of the CTDD was justified and did not elevate the stop into an arrest. See United States v. Beck, 598 F.2d 497, 501 (9th Cir. 1979) (utilization of force does not transform a stop into an arrest where the use of force "is precipitated by the conduct of the individual being detained or if it occurs under circumstances justifying fears for personal safety").

3. The Use of the CTDD Was Not Causally Connected to the Discovery of the Aliens

Finally, Defendant argues that regardless of whether the vehicle stop was justified by reasonable suspicion or probable cause, the CTDD constituted an excessive use of force. The Ninth Circuit, however, has upheld the use of tire deflation devices. In United States v. Hernandez-Garcia, 284 F.3d 1135 (9th Cir. 2002), Border Patrol agents used a tire deflation device to stop a van that drove across the international border in an area frequently used by alien smugglers, at a place not designated as a point of entry. The Ninth Circuit held that there was "no basis for invalidating the arrest or suppressing evidence, on account of use of the spike mat." Id. at 1140. Like Defendant here, the defendant in Hernandez-Garcia, relied upon Graham v. Connor, 490 U.S. 386 (1989), which concerns the unreasonable use of force for purposes of a Section 1983 civil lawsuit seeking damages. Even if the Court were to find that the use of the CTDD was somehow unreasonable, Defendant has not cited a single case supporting that suppression of evidence would be the appropriate remedy.

Suppression of evidence should be used as a "last resort" rather than a first impulse. Hudson v.

Michigan, 547 U.S. 586, 589-91(2006) (holding suppression of evidence was not the appropriate remedy for violation of the knock-and-announce rule). Suppression of evidence is only warranted where there is a causal connection between the Fourth Amendment violation and the seized evidence. Id. at 2164; see also Segura v. United States, 468 U.S. 796, 814 (1984) (suppression of evidence not appropriate remedy where police conducted an illegal entry and then waited with the suspect in the house for 19 hours until a search warrant was obtained because "[n]one of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment"); United States v. Ankeny, 502 F.3d 829, 837-38 (9th Cir. 2007). In Ankeny, officers had a valid search warrant, but the defendant argued that the evidence discovered during the search should be suppressed because the manner of entry (police used a battering ram, rubber bullets and two flash bang devices, one of which seriously injured the defendant) violated the Fourth Amendment. Id. The Ninth Circuit declined to decide whether the manner of entry was reasonable, holding that even if the police behaved unreasonably, suppression of evidence would be inappropriate because the discovery of the evidence was not causally related to the manner of executing the search. Id.

Here, as discussed above, Agents had ample reasonable suspicion to stop Defendant's vehicle. Regardless of the means used to effectuate the stop, Agents would have discovered the six illegal aliens in the vehicle as soon as Defendant yielded, therefore, the evidence found is not causally connected to the use of the CTDD. Accordingly, because the agents were justified in stopping Defendant's vehicle, the manner of conducting the stop should not result in the suppression of evidence.

D. THE MOTION TO SUPPRESS EVIDENCE UNDER THE FIFTH AMENDMENT SHOULD BE DENIED WITHOUT A HEARING

Defendant moves to suppress any statements taken in violation of Miranda v. Arizona, 384 U.S. 436 (1969) and claims that the United States must prove that Defendant's waiver of his Miranda rights were voluntary, knowing and intelligent. First, the rights given to Defendant were plain and unambiguous. Second, Defendant failed to provide a declaration alleging a specific factual dispute in regards to his post-Miranda statements.

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1. Standards Governing Admissibility of Statements

A statement made in response to custodial interrogation is admissible under Miranda v. Arizona, 384 U.S. 437 (1966) and 18 U.S.C. § 3501 if a preponderance of the evidence indicates that the statement was made after an advisement of rights, and was not elicited by improper coercion. Colorado v. Connelly, 479 U.S. 157, 166-70 (1986) (preponderance of evidence standard governs voluntariness and Miranda determinations; valid waiver of Miranda rights should be found in the "absence of police overreaching"; "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary'"). Although the totality of circumstances, including characteristics of the defendant and details of the interview, should be considered, improper coercive activity is a necessary predicate to suppression of any statement. Id.; cf. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Even where a defendant may be in a poor mental or physical condition that he cannot rationally waive his rights (and misconduct can be inferred based on police knowledge of such condition, Connelly, 479 U.S. at 167-68), the condition must be so severe that the defendant was rendered utterly incapable of rational choice. United States v. Kelley, 953 F.2d 562, 565 (9th Cir.1992) (collecting cases rejecting claims of physical/mental impairment as insufficient to prevent exercise of rational choice).

2. Defendant's Post-Arrest Statements Were Voluntary and Made After a Knowing, Intelligent, and Voluntary Waiver

Defendant's post-arrest statements are admissible because he knowingly, intelligently, and voluntarily waived his Miranda rights. As described in the Statement of Facts,, the evidence shows that Defendant waived his rights and that such waiver was voluntary. Regardless of whether there was a lapse of one or two minutes when Atiles stopped and then re-started in the videotape, the apprehension report describes what occurred during that lapse. Defendant makes no specific allegation of any coercive conduct on the part of the interviewing officers. Neither does Defendant claim that his statements resulted from being intimidated, threatened, or coerced in any manner by the interviewing officers. Defendant fails to allege with any specificity that the Miranda advisal and waiver were improper. Overall, the facts demonstrate that Defendant waived his Miranda rights and voluntarily spoke with Agents. See, e.g., Oregon v. Bradshaw, 462 U.S.1039, 1045-47 (1983).

Indeed, where Defendant asserts that the Agents must explain this lapse, the explanation falls on Defendant. Here, Defendant failed to file the required declaration in support of his motion to suppress and his allegation of a Miranda violation fails to demonstrate there is a disputed factual issue requiring an evidentiary hearing. See United States v. Howell, 231 F.3d 616, 620-23 (9th Cir. 2000) (holding that "[a]n evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist."); United States v. Batiste, 868 F.2d 1089, 1093 (9th Cir. 1989) (where "defendant, in his motion to suppress, failed to dispute any material fact in the government's proffer, ... the district court was not required to hold an evidentiary hearing"); United States v. Moran-Garcia, 783 F. Supp. 1266, 1274 (S.D. Cal. 1991) (boilerplate motion containing indefinite and unsworn allegations was insufficient to require evidentiary hearing on defendant's motion to suppress statements); Crim. L.R. 47.1.

Accordingly, this Court should deny Defendant's motion to suppress and find, based on the Statement of Facts attached to the Complaint in this case, that Defendant's statements were voluntary and given in accordance with Miranda. See Batiste, 868 F.2d at 1092 (government proffer based on the statement of facts attached to the complaint is alone adequate to defeat a motion to suppress where the defense fails to adduce specific and material facts).

E. SEVERANCE OF THE COUNTS IS NOT WARRANTED

Defendant does not contend that joinder of the offenses charged in the Indictment is improper under Rule 8(a). Instead, Defendant seeks to sever Counts 1, 3, 5, and 7 (the bringing in of illegal aliens for commercial advantage and financial gain, aiding and abetting charges in violation of 8 U.S.C. § 1324(a)(2)(B)(ii) and 18 U.S.C. § 2) from Counts 2, 4, 6, and 8 (the transportation of illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(ii) and (v)(II)) because he may present a duress defense. He asserts that there will be two separate standards relevant to a duress defense and then concludes: "It is too much to ask of a jury to compartmentalize these conflicting burdens. Asking the jury to do so will promote confusion and runs the risk of prejudicing" Defendant. (Def. Mot. at 20.)

Such assertion is insufficient to warrant severance under Rule 14(a). Indeed, the basis for the motion is premised on the fact that Defendant will testify at trial. In United States v. Nolan, 700 F.2d 479, 483 (9th Cir.1983), the Ninth Circuit determined that the severance is justified only where the defendant makes a sufficient proffer showing that he has important testimony to give on one count and a strong need to refrain from testifying on another count. Here, Defendant failed to demonstrate that he actually intends to testify as to any of the Counts in the Indictment.

Moreover, even assuming Defendant provides a proffer that he will present facts related to duress, his reasoning in his motion demonstrates that such facts relate to all Counts charged in the Indictment. See id. Thus, severance is unwarranted.

Finally, although the United States disagrees with Defendant's analysis of the use of duress in Ninth Circuit Jury Instructions, Defendant's analysis exposes that the his real issue before the Court is not one of severance of Counts but rather of proper Jury Instructions. Such matters may be addressed with the Court at trial and not at the motion hearing stage.

F. THE GRAND JURY WAS NOT MIS-INSTRUCTED

Defendant moves to dismiss the Indictment against him for alleged errors in the Court's instruction of the grand jury panel. The United States explicitly incorporates by reference the briefing on this issue submitted in United States v. Martinez-Covarrubias, 07CR0491-BTM, and United States v. Bermudez-Jimenez, 07CR1372-JAH. This motion has been denied by each court that has considered it. See, e.g., October 11, 2007 Order in United States v. Martinez-Covarrubis, 07CR0491-BTM (Docket Number 30); United States v. Bermudez-Jimenez, 07CR1372-JAH, 2007 WL 4258239 (S.D. Cal. Dec. 3, 2007). For the same reasons relied on by those Courts, this Court should deny the motion.

G. THE GRAND JURY TRANSCRIPTS SHOULD NOT BE PRODUCED

Federal Rule of Criminal Procedure 6(e)(2) provides that the matters occurring before the grand jury must not be disclosed, except for limited exceptions set forth in Rule 6(e)(3). Rule 6(e)(3)(E) allows the district court to authorize disclosure of a grand jury matter at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.

Defendant fails to assert that he has a particularized need for the grand jury transcripts. Specifically, he fails to demonstrate how his statement to Agents following his arrest constitutes exculpatory evidence[1/] or otherwise warrants dismissal of the indictment. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 217-24 (1979). In this case, there is no evidence of any ground may exist to dismiss the indictment because of a matter that occurred before the grand jury. Probable cause existed to believe that Defendant violated 8 U.S.C. § 1324 and 18 U.S.C. § 2. Therefore, the court may not authorize the disclosure of grand jury transcripts in this matter under Rule 6(e)(3)(E)(ii). As such, Defendant has not met his burden to show a particularized need to overcome the secrecy of the grand jury proceedings. Thus, the Court should deny this motion,

H. LEAVE TO FILE FURTHER MOTIONS

The United States does not oppose Defendant's request for leave to file further motions, so long as such motions are based on newly-produced discovery or newly-obtained evidence and the United States is provided an opportunity to respond.

I. EVIDENTIARY HEARING

The United States leaves to the Court's discretion whether or not an evidentiary hearing would assist the Court in evaluating the issues raised by Defendant in his motions to suppress. Given the Court set August 21, 2008 not only for a motion hearing but also for an evidentiary hearing, the United States took the pre-cautionary measure to subpoena the various Border Patrol Agents from the Calexico Border Patrol Station to testify on that date. Should the Court decide in advance to not move forward with an evidentiary hearing or to change the hearing date, the United States will advise the Agents accordingly.

III

UNITED STATES' MOTION FOR RECIPROCAL DISCOVERY

Defendant has invoked Rule 16(a) and the United States has complied voluntarily with the requirements of Rule 16(a). Therefore, provision 16(b) of that rule, requiring reciprocal discovery, is applicable. The United States hereby requests Defendant to permit the United States to inspect, copy, and photograph any and all books, papers, documents, photographs, tangible objects, or make copies of portions thereof, which are within the possession, custody or control of Defendant and which he intends to introduce as evidence in his case-in-chief at trial.

[1/] Regardless, prosecutors have no legal duty to present exculpatory evidence to a grand jury. United States v. Williams, 504 U.S. 36, 52 (1992); United States v. Isgro, 974 F.2d 1091, 1096 (9th Cir. 1992).

The United States further requests that it be permitted to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, which are in the possession or control of Defendant, which he intends to introduce as evidence-in-chief at the trial or which were prepared by a witness whom Defendant intends to call as a witness. The United States also requests that the Court make such orders as it deems necessary under Rule 16(d)(1) and (2) to insure that the United States receives the discovery to which it is entitled.

Federal Rule of Criminal Procedure 26.2 requires the production of prior statements of all witnesses, except Defendant. The time frame established by the rule requires the statement to be provided after the witness has testified, as in the Jencks Act. The United States hereby requests that Defendant be ordered to supply all prior statements of defense witnesses by a reasonable date before trial to be set by the Court. This order should include any form these statements are memorialized in, including but not limited to, tape recordings, handwritten or typed notes and/or reports.

IV

CONCLUSION

For the foregoing reasons, the United States respectfully requests that Defendant's motions, except where not opposed, be denied and the United States' motion for reciprocal discovery be granted.

DATED: August 14, 2008

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

/s/ Charlotte E. Kaiser
CHARLOTTE E. KAISER
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDLIO GASTELUM, Defendant.	Case No. 08CR2032-JLS **CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that:

I, CHARLOTTE E. KAISER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101.

I am not a party to the above-entitled action. I have caused service of Response and Opposition to Defendant's Motions to Compel Discovery, to Preserve Evidence, to Suppress Evidence under the Fourth Amendment, to Suppress Statements under the Fifth Amendment, to Sever Counts, to Dismiss the Indictment due to Misinstruction, to Produce Grand Jury Instructions, and for Leave to File Further Motions and its Motion for Reciprocal Discovery on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies:

Robert H. Rexrode III, Attorney for Defendant

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 14, 2008.

/s/ Charlotte E. Kaiser
CHARLOTTE E. KAISER